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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MITCHELL YOUNG,

Defendant and Appellant.

D054168

(Super. Ct. No. SCD214249)

APPEAL from a judgment of the Superior Court of San Diego County, Gale E. Kaneshiro, Judge. Affirmed.

I.

INTRODUCTION

A jury found Mitchell Young guilty of possession of a controlled substance (Health & Saf. Code, § 11350) (count 1), resisting an officer (Pen. Code, § 148, subd. (a)(1))¹ (count 2), destroying evidence (§ 135) (count 3), and being under the influence

¹ Unless otherwise specified, all subsequent statutory references are to the Penal Code.

of a controlled substance (Health & Saf. Code, § 11550) (count 4). The trial court sentenced Young to the upper term of three years on count 1, and imposed concurrent terms of 180 days on the remaining counts.

On appeal, Young claims that there is insufficient evidence to support the jury's verdict finding him guilty of possession of a controlled substance (Health & Saf. Code, § 11350) (count 1). Young also claims that his conviction for destroying evidence (§ 135) (count 3) must be reversed because the trial court erroneously instructed the jury pursuant to CALCRIM No. 371 (Consciousness of Guilt: Suppression of Evidence). Young claims that it was improper for the court to instruct the jury pursuant to CALCRIM No. 371 on count 3 because the alleged conduct that supported giving the instruction also constituted an element of the offense charged in count 3. We affirm the judgment.

II.

FACTUAL BACKGROUND

On June 13, 2008, at approximately 3:50 a.m., San Diego Police Officers Matthew Ruggiero and Jonathan Dungan were in their police car on patrol in the 4500 block of Ocean View Boulevard.² As Officer Ruggiero drove the police car around the corner from Ocean View Boulevard onto West Street, he saw Young standing in the dark with two women. As the police car came into Young's view, Young ran four or five steps and ducked behind a parked car, out of the officers' view.

² Officer Ruggiero testified that the area is known as one in which narcotics are frequently bought, sold, and used.

Officer Ruggiero pulled his police car up next to the car behind which Young was crouching. Officer Ruggiero then got out of his police car and approached Young. Officer Ruggiero asked Young what he was doing hiding behind a car. Young did not answer. Officer Ruggiero asked Young if he was napping. Young responded by "nodd[ing] his head." At that point, Officer Ruggiero noticed that Young was chewing something. Officer Ruggiero became concerned that Young might be attempting to dispose of narcotics, and told Young to spit. Young began to chew faster. Officer Ruggiero placed the blade of his right hand on Young's neck in an attempt to prevent Young from swallowing the object. Young continued to attempt to swallow. Officer Ruggiero repeatedly directed Young to spit, or to open his mouth. Young continued to refuse to comply with the officer's directions.

Officer Dungan came over to assist Officer Ruggiero, and Young began to struggle with the officers. During the struggle, Officer Ruggiero placed his arm around Young's neck in an attempt to subdue him. Officer Ruggiero felt Young swallow. Shortly thereafter, Young stopped resisting and allowed Officer Ruggiero to inspect his mouth. Officer Ruggiero found nothing inside Young's mouth. The officers arrested Young.

After placing Young under arrest, Officer Ruggiero went back to the side of the parked car where Young had been crouching. Officer Ruggiero found a substance on the ground that appeared to be cocaine base. Police later analyzed the substance, and determined that it constituted .30 grams of cocaine. The officers took Young to the police station and obtained a urine sample. Young's urine tested positive for cocaine.

III.

DISCUSSION

A. *There is sufficient evidence to support the jury's verdict finding Young guilty of possession of a controlled substance*

Young claims that there is insufficient evidence to support the jury's verdict finding him guilty of possession of a controlled substance (Health & Saf. Code, § 11350) (count 1).

In determining the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

"[T]he elements of [a violation of Health and Safety Code section 11350] are: actual or constructive possession with knowledge of the presence of the drug and its narcotic character. [Citations.] The elements may be established by circumstantial evidence and any reasonable inference drawn from such evidence. [Citations.]" (*People v. West* (1990) 224 Cal.App.3d 1337, 1347-1348.)

In *People v. Tripp* (2007) 151 Cal.App.4th 951, 956-957 (*Tripp*), the court summarized the relevant case law describing the quantum of evidence necessary to prove the crime of unlawful possession of narcotics:

"It is well settled, of course, that in a prosecution for unlawful possession of narcotics, it is incumbent upon the prosecution to present evidence from which the trier of the facts reasonably may infer and find that the accused had dominion and control over the contraband with knowledge of its presence and narcotic character. Mere proof of opportunity of access to a place where narcotics are found will not support a finding of unlaw[f]ul possession. [Citation.]' [Citation.] It is also well settled, however, that each of these essential elements may be proved by circumstantial evidence and any reasonable inferences drawn from such evidence. [Citations.] For example, knowledge of a substance's narcotic nature may be shown by evidence of the defendant's furtive acts and suspicious conduct indicating a consciousness of guilt, such as an attempt to flee or an attempt to hide or dispose of the contraband [citation], or by evidence showing a familiarity with the substance, such as needle marks or other physical manifestations of drug use or instances of prior drug use. [Citations.] When the contraband is found in a place to which a defendant and others have access and over which none has exclusive control 'no sharp line can be drawn to distinguish the congeries of facts which will and that which will not constitute sufficient evidence of a defendant's knowledge of the presence of a narcotic.' [Citation.]"

In this case, a police officer in a marked police car observed Young standing in the dark with two other persons in a high narcotics area. When the police car came into Young's view, Young ran and hid behind a car. A jury could have reasonably inferred that Young's actions constituted "furtive act[s]," evincing a consciousness of guilt. (*Tripp, supra*, 151 Cal.App.4th at p. 956.) Thereafter, the officer approached Young and saw that he was chewing something. The officer instructed Young to spit the object out of his mouth. Young refused to comply, even after being physically restrained. A jury

could reasonably have inferred that Young made an "attempt to hide or dispose of . . . contraband." (*Ibid.*) After Young was arrested, the officer searched the area and found cocaine base on the ground in the location where Young had been hiding. After being transported to the police station, the police obtained a urine sample from Young, which tested positive for cocaine. The jury could have reasonably regarded this evidence as a "physical manifestation[] of drug use." (*Ibid.*)

While we are cognizant that "no sharp line" can be drawn between facts that will or will not constitute sufficient evidence to support a finding of knowledge of the presence of a narcotic (*Tripp, supra*, 151 Cal.App.4th at p. 956), the evidence in the record, as described above, was sufficient for the jury to infer that Young had knowledge of the presence of the cocaine base found on the ground by the officer and that Young exercised dominion and control thereof.

We reject Young's argument that there is insufficient evidence to support the verdict in this case in light of case law holding that the "mere presence" of a person at the premises where narcotics are located (*People v. Boyd* (1959) 173 Cal.App.2d 537, 539 (*Boyd*); *People v. Johnson* (1984) 158 Cal.App.3d 850, 854), or a person's mere "opportunity of access" to a place where narcotics are found (*People v. Redrick* (1961) 55 Cal.2d 282, 285 (*Redrick*)), is insufficient to establish possession. In this case, as noted above, in addition to narcotics being found on the ground where Young had been standing minutes before, Young attempted to hide from the police, refused to comply with an officer's direction to spit out an object that Young had been chewing, struggled with officers before being arrested, and had cocaine in his urine when tested after the

incident. The evidence in this case thus demonstrated more than Young's "mere presence" (*Boyd, supra*, 173 Cal.App.2d at p. 539) at the scene and more than a mere opportunity for him to access the cocaine (*Redrick, supra*, 55 Cal.2d at p. 285).

B. *Young forfeited his contention that the trial court should have instructed the jury that CALCRIM No 371 did not apply to count 3; in any event, the trial court's failure to provide the instruction did not impermissibly lessen the People's burden of proving Young guilty beyond a reasonable doubt*

Young claims that the trial court failed to provide a "limiting instruction" that would have instructed the jury that CALCRIM No. 371 (Consciousness of Guilt: Suppression of Evidence) did not apply to the charge of destroying evidence (§ 135) (count 3). Young argues that a limiting instruction was warranted because the alleged conduct that supported giving CALCRIM No. 371 as to the other charged offenses constituted an element of count 3. Young maintains that failing to provide the limiting instruction allowed the jury to find him guilty based on an "illogical inference of guilt [that] did not have to be proved beyond a reasonable doubt" and thereby impermissibly lessened the People's burden to prove him guilty beyond a reasonable doubt.

1. *Factual and procedural background*

During a conference outside the presence of the jury, the following colloquy occurred:

"The Court: The next instruction in order, People had requested 371, Consciousness of Guilt: Suppression of Evidence. And the court was going to modify that first paragraph so that it now reads, quote: If the defendant tried to hide or suppress evidence, that conduct may show that he was aware of his guilt. At this time, Mr. [defense counsel] did you wish to be heard?"

"[Defense counsel]: Well, it seems to me that is incorporated, isn't it, into the instruction on count 3?

"The Court: No. Because this is specifically — this is a consciousness of guilt of the actions. Count 3 would be the corpus. So any objection at this time, Mr. [defense counsel]?

"[Defense counsel]: No. Well I would object on general grounds. But I am assuming I am going to be overruled on that.

"The Court: Okay. The court will leave that instruction 371 in."

The trial court instructed the jury pursuant to a modified version of CALCRIM No. 371, as follows:

"If the defendant tried to hide or suppress evidence, that conduct may show that he was aware of his guilt. If you conclude the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

The trial court also instructed the jury regarding the People's burden to prove Young guilty of the charged offenses beyond a reasonable doubt, as follows:

"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt."

The court also instructed the jury regarding the elements of count 3, as follows:

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant knew that a matter or thing was of an evidentiary nature for any trial, inquiry or investigation;

"2. The defendant willfully destroyed or concealed the same; and

"3. The defendant did so with the specific intent to prevent it from being produced in any trial, inquiry or investigation."

2. *Young forfeited his claim that the trial court should have provided a limiting instruction informing the jury that CALCRIM No. 371 did not apply to count 3*

Young did not request that the trial court provide a limiting instruction that would have instructed the jury that CALCRIM No. 371 did not apply to the charge of destroying evidence (§ 135) (count 3). Young thus forfeited his contention that the trial court should have informed the jury that CALCRIM No. 371 did not apply to count 3. (See *People v. Carrington* (2009) 47 Cal.4th 145, 189 ["Defendant did not request in the trial court that the consciousness-of-guilt instruction be modified or limited in any way, and consequently has forfeited any claim that the instruction should have been modified"].) Further, since Young does not dispute that the trial court properly instructed the jury with respect to CALCRIM No. 371 as to the other charged offenses, Young's objection on "general grounds" in the trial court did not preserve the claim he presses on appeal.

3. *Young's claim fails on the merits*

Assuming that Young preserved this issue despite his failure to request a limiting instruction, we are not persuaded that the instruction impermissibly lessened the People's burden of proving each element of the section 135 offense beyond a reasonable doubt. A similar contention was rejected in *People v. Henry* (1937) 23 Cal.App.2d 155, 164-165 (*Henry*). In *Henry*, a defendant charged with negligent homicide and failing to stop and render aid argued that "the trial court gave an instruction on flight which it is contended was peculiarly prejudicial to him because of the fact that flight is an essential element of

the offense [failing to render aid] of which he was convicted." (*Id.* at p. 164.) The *Henry* court rejected this contention, noting that the jury was permitted to take the defendant's flight into consideration in deciding the negligent homicide count, and that the trial court had instructed the jury that the People were required to prove each of the elements of the failure to render aid offense beyond a reasonable doubt. (*Id.* at pp. 164-165.) The *Henry* court reasoned, "We think, therefore, that the instruction regarding flight, even if its effect is restricted to the [failure to render aid] offense, was not prejudicial to the defendant when the entire body of the court's instructions is taken into consideration." (*Id.* at p. 165.)

In this case, CALCRIM No. 371 included the caveat that evidence of an attempt to hide or suppress evidence "cannot prove guilt by itself." Further, the trial court instructed the jury that the People were required to prove Young guilty on all of the elements of count 3 beyond a reasonable doubt. Accordingly, we conclude that the trial court's failure to provide a limiting instruction with respect to CALCRIM No. 371 did not impermissibly reduce the People's burden of proving Young guilty beyond a reasonable doubt on that count.

IV.
DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.